

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

ELBERT HICKS,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMBER
PH-0353-98-0439-I-1

DATE: September 30, 1999

Elbert Hicks, Ceiba, Puerto Rico, pro se.

Anita B. Gwynn, Esquire, Baltimore, Maryland, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his partial restoration appeal for lack of jurisdiction on grounds of res judicata. For the reasons set forth below, we DENY the petition, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, and MODIFY the initial decision to dismiss the appeal as res judicata.

BACKGROUND

¶2 The appellant, formerly a Letter Carrier at a Postal facility in Baltimore, Maryland, sustained a compensable injury in July 1984 and resigned from the agency in September 1984. Initial Appeal File (IAF), Tab 7. He partially

recovered from his injury, requested restoration to his former position in 1985, and appealed when the agency refused restoration. *Id.* In an initial decision, which became a final Board decision, the administrative judge reversed the agency's action and directed the agency to place the appellant's name on a reemployment list and to extend him priority consideration. *Id.*; see *Hicks v. U.S. Postal Service*, 35 M.S.P.R. 27, 28 (1987).

¶3 Thereafter, the appellant filed a petition for enforcement. *Hicks*, 35 M.S.P.R. at 28. In a compliance initial decision, a chief administrative judge held, inter alia, that the agency had complied with the Board's final decision in all respects except one -- placing the appellant's name on a reemployment list for Charleston, South Carolina, his last place of residence in the United States. *Id.* After the agency submitted evidence of full compliance, the appellant requested review by the Board. *Id.* at 29. The Board held, inter alia, that as a partially recovered employee, the appellant was entitled only to priority consideration for reemployment. *Id.* at 30. In so holding, the Board noted that the agency had submitted evidence that it had afforded the appellant priority consideration in Charleston, first for a part-time position, then for a full-time position. *Id.*¹ Thus, the Board found that the agency had complied with the Board's final order to afford the appellant priority consideration as a partially recovered employee. *Id.*

¶4 In July 1994, the appellant again filed a restoration appeal, which the Board dismissed for lack of jurisdiction, finding, inter alia, that he had requested vocational rehabilitation from the Department of Labor, not restoration by the agency. IAF, Tab 7. The appellant then filed a petition for review, which the Board denied. *Id.* The U.S. Court of Appeals for the Federal Circuit affirmed this final decision on December 6, 1995. *Id.*

¹ The agency later declined to place the appellant in a position at Charleston because his suspended driver's license precluded him from driving postal vehicles. IAF, Tabs 6, 7.

¶5 On September 18, 1998, the appellant filed this pro se Board appeal claiming that due to race and sex discrimination, the agency denied him, on some unspecified date, partial restoration to duty in his local area. IAF, Tab 1. The administrative judge's acknowledgment order informed him that jurisdiction appeared to be lacking since he was alleging that he was improperly restored to duty, whereas a partially recovered employee may appeal from only an agency's denial of restoration, or failure (upon reemployment), to credit time spent on compensation for purposes of rights and benefits based upon the length of service. IAF, Tab 2. In subsequent submissions, the appellant requested a hearing, asserting that he was receiving partial disability compensation for his back injury, and that the agency's failure to respond to his partial restoration request violated merit principles, amounted to a constructive discharge, and was reprisal for his prior protected activity. IAF, Tabs 3, 4.

¶6 The agency moved to dismiss the appeal on grounds of res judicata, asserting that the appellant was attempting to relitigate, inter alia, the Federal Circuit's affirmance of the Board's final order dismissing his 1994 restoration appeal. IAF, Tab 6 at 2, Tab 7. The administrative judge then ordered the appellant to present argument and evidence to show good cause why his appeal should not be dismissed on grounds of res judicata, in light of the Federal Circuit's decision. IAF, Tab 8. The appellant responded that he was receiving partial compensation payments through the Department of Labor; that the agency had denied "4 or 5" of his restoration requests made in 1998; that those restoration requests were entirely different from his 1994 restoration request; and that he was now seeking restoration to duty in Ceiba, Puerto Rico. IAF, Tab 9. As evidence of his alleged 1998 restoration requests, the appellant submitted copies of three return receipts, which bear the signatures of three different agency employees, and indicate delivery dates of either July 22, 1998 or August 7, 1998, to the Postal Service. *Id.* The appellant also submitted a copy of his July 29, 1998 letter to an unidentified

injury compensation supervisor, wherein he stated, "*I am once again applying for vocational rehabilitation and under 546 Reemployment of Employees Injured on Duty 546.132, 133 ... in my local commuting area Ceiba Puerto Rico.*" *Id.* (emphasis supplied).

¶7 Based on only the documentary evidence of record, the administrative judge dismissed the appeal for lack of jurisdiction on grounds of res judicata. IAF, Tab 10. He found that the appellant was attempting to relitigate his 1994 restoration appeal, which the Board had dismissed for lack of jurisdiction and which the Federal Circuit had affirmed. *Id.* He further found that, in the absence of an appealable action, the Board lacked jurisdiction to consider the appellant's discrimination claims. *Id.*

¶8 In his petition for review, the appellant reasserts that he is appealing from the agency's failure to respond to his July 1998 request for partial restoration and resubmits a copy of that request. Petition For Review File (PFRF), Tab 1. Additionally, he submits evidence of his partial recovery, which predates the initial decision and purportedly new evidence of his continued receipt of partial Office of Workers' Compensation Programs (OWCP) benefits. PFRF, Tabs 1, 3. Further, he requests that the agency be required to "produce all letters requesting restoration." PFRF, Tab 3. The agency has not responded to the petition. After the record closed on review, the appellant resubmitted the purportedly new evidence of his continued receipt of partial OWCP benefits. PFRF, Tab 4.²

ANALYSIS

¶9 A partially recovered employee is one who has recovered sufficiently to return to less physically demanding work. *Leach v. Department of Commerce*, 61 M.S.P.R. 8, 15 (1994). Under 5 C.F.R. § 353.301(d), agencies are required to

² In light of our holding in this Opinion and Order, we need not address the evidence proffered by the appellant on review.

“make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty.” Where an individual is entitled to seek and does seek restoration as a partially recovered employee, the agency is continuously obligated to make restoration efforts, to include searching throughout the agency but within the local commuting area for vacant positions to which he could be restored and to consider him for such vacancies. *See Leach*, 61 M.S.P.R. at 15-16, 19. For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station. *Sapp v. U.S. Postal Service*, MSPB Docket No. SF-0353-96-0054-B-2, slip op. ¶¶ 6-7 (May 26, 1999); *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997).

¶10 Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). As noted above, the Board previously adjudicated the appellant's 1985 restoration appeal, ordering that, as a partially recovered employee, he was entitled to have his name placed on a reemployment list and to receive priority consideration for vacant positions at the Charleston postal facility. *Hicks*, 35 M.S.P.R. at 29-30. The Board subsequently found that the agency had fully complied with this final order. *Id.* at 30. As such, the agency's continuous obligation to accord the appellant priority consideration and the appellant's entitlement to restoration with the agency as a partially recovered employee is limited to the Charleston local commuting area. *See Sapp*, slip op. ¶¶ 6-7; *Sapp*, 73 M.S.P.R. at 193-94.

¶11 We emphasize here that the provisions of part 353 of 5 C.F.R. mandate that agencies continually safeguard the restoration rights of partially recovered employees. *See Leach*, 61 M.S.P.R. at 15-16. However, in asserting in this

appeal that he is entitled to priority consideration for restoration as a partially recovered employee to Ceiba, Puerto Rico, the appellant merely attempts to relitigate the merits of his 1985 restoration appeal. We find, therefore, that this appeal is barred on grounds of res judicata.³

¶12 We reopen this appeal to correct the administrative judge's error in dismissing the appeal for lack of jurisdiction on grounds of res judicata. The administrative judge dismissed the appellant's appeal from the agency's alleged failure to respond to his 1998 request for partial restoration, finding that the appeal was res judicata in light of *Hicks v. U.S. Postal Service*, 73 F.3d 379 (Fed. Cir. 1995) (Table); IAF, Tab 7, which affirmed the Board's dismissal of the appellant's 1994 restoration appeal for lack of jurisdiction. The Board has held that the doctrine of res judicata is not a basis to dismiss an appeal for lack of jurisdiction, but rather, a basis to dismiss an appeal over which the Board has jurisdiction, noting that, where a prior appeal has been dismissed on jurisdictional grounds, there has been no examination of the merits of the agency's action. *Peartree*, 66 M.S.P.R. at 337; *Mycka v. Office of Personnel Management*, 56 M.S.P.R. 675, 679 (1993){ TA \l "Mycka v. Office of Personnel Management, 56 M.S.P.R. 675, 679 (1993)" \c 1 }. Thus, the administrative judge erred in dismissing this appeal for lack of jurisdiction based on res judicata because of the appellant's 1994 restoration appeal. Rather, contrary to the administrative judge's finding, this appeal is res judicata in light of the Board's final decision in the appellant's 1985 restoration appeal.

³ Indeed, were we to reach the merits of this appeal, the appellant would not prevail. In requesting restoration to Ceiba, Puerto Rico, rather than the Charleston local commuting area, the previously adjudicated geographic area of his right to priority consideration, the appellant fails to assert a meritorious claim that the agency acted "arbitrarily and capriciously" by allegedly denying his asserted 1998 restoration request. 5 C.F.R. § 353.304(c); *Moore v. U. S. Postal Service*, 76 M.S.P.R. 373, 376 (1997).

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

this law as well as review other related material at our web site,
<http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.